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SUPREME COURT OF THE UNITED STATES

No. 79-2031

INSURANCE COMPANY OF NORTH AMERICA - - - - Petitioner

versus

JOE TERRY POYNER and ERMA WERKE GMBH - - - - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-3105 Below

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SUPREME COURT OF THE UNITED STATES

No._____

INSURANCE COMPANY OF NORTH AMERICA - - - - *Petitioner*

v.

JOE TERRY POYNER and ERMA WERKE GMBH - - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Insurance Company of North America, hereby petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit for the purpose of reviewing the action of that Court in a proceeding entitled, "No. 78-3105, Joe Terry Poyner v. Erma Werke Gmbh and Insurance Company of North America", in which proceeding the said Court rendered an opinion and judgment on March 28, 1980, both of which are reproduced in the Appendix hereto.

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The following are the opinions, orders, etc. in the courts below, all of which are reproduced in the Appendix hereto, at the page numbers indicated. As of the preparation of this Petition, none has been officially reported.

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GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked on the ground that the opinion and judgment of the United States Court of Appeals for the Sixth Circuit is in contravention of the *Fourteenth Amendment of the Constitution of the United States,* in that they deny to the Petitioner the protection of due process of law, and the equal protection of the laws.

THE JUDGMENT SOUGHT TO BE REVIEWED

The judgment sought to be reviewed and the opinion on which it was based were filed in the United States Court of Appeals for the Sixth Circuit on March 28, 1980. Both are reproduced in the Appendix hereto, at pages A38 and A24, respectively.

JURISDICTION

Jurisdiction is conferred upon this Court by *28 U.S.C. 1254(1).*

THE QUESTION PRESENTED FOR REVIEW

May a United States District Court situated in the State of Kentucky exercise personal jurisdiction over a foreign (West Germany) manufacturer of a firearm without denying to such manufacturer due process of law and the equal protection of the laws prescribed by the *Fourteenth Amendment of the Constitution of the United States,* in an instance where the manufacturer effected a sale of the firearm in West Germany to a West Germany firm, which later sold the firearm to a firm based in the United States of America (but not in Kentucky), which firm later sold the firearm to an individual in Tennessee, which firearm later found its way into Kentucky by an apparently noncommercial fortuitous transient process, and was used in inflicting injury upon a citizen of Kentucky, the said manufacturer having had no contacts with the State of Kentucky, and not having engaged in any of the activities prescribed as prerequisite by the Kentucky "long-arm" service of process statute? *(Compare World-Wide Volkswagen Corporation* v. *Woodson,* —— *U. S.* ——, *62 L. Ed. 2d 490, 100 S. Ct.* ——*).*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED HEREIN

It is believed that the constitutional provisions and statutes quoted below are applicable in the consideration of this Petition. References to "KRS" denote sections of the Kentucky Revised Statutes.

Constitution of the United States, Fourteenth Amendment, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KRS 454.210(1) AND (2)(a)(1-5)

454.210. **Personal jurisdiction of courts over nonresidents–Process, how served–Venue.**–(1) As used in this section, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this commonwealth.

(2)(a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim rising from the person's:

1. Transacting any business in this commonwealth;

2. Contracting to supply services or goods in this commonwealth;

3. Causing tortious injury by an act or omission in this commonwealth;

4. Causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this commonwealth, provided that the tortious injury occurring in this commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the commonwealth.

5. Causing injury in this commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this commonwealth when the seller knew such person would use, consume, or be affected by, the goods in this commonwealth, if he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this commonwealth;

STATEMENT OF THE CASE

History of Litigation

This is a products liability suit, instituted by the Respondent Joe Terry Poyner (hereinafter, "Poyner") against the manufacturer of a firearm, Erma Werke Gmbh (hereinafter, "Erma"), and against the distributor through whom the firearm had passed, L.A. Distributors, Inc., (hereinafter, "L.A.").

Erma was a Gmbh, located in Dachau, West Germany (Federal Republic of Germany), and service of process upon it was attempted by employing the Kentucky "long-arm" statute, *KRS 454.210.*

No defense having been made by Erma, Poyner procured against it a judgment by default.

By supplemental complaint, Poyner then named two additional defendants, Lear Siegler, Inc., the parent corporation of Erma, and the present Petitioner, Insurance Company of North America (hereinafter, "INA"), which had issued a policy of liability insurance in which Erma was a named insured.

Poyner obtained a judgment against Lear Siegler, Inc., which was reversed on appeal *(Poyner* v. *Lear Siegler, Inc., 542 F.2d 955 (6th Cir. 1976)).* Thereafter INA procured a summary judgment, which was reversed on appeal to the United States Court of Appeals for the Sixth Circuit, which reversal gave rise to the filing of this Petition for Certiorari.

The Pertinent Facts

On February 28, 1968 Poyner was injured as the result of the firing of a pistol which had been manufactured by Erma. On that date there was in effect a liability insurance policy issued by INA, at its office in Frankfurt, West Germany, in which Erma was a named insured.

On July 18, 1969 Poyner instituted a products liability suit against Erma and a corporation through whom the firearm had passed in the United States of America, the aforesaid L.A.. By virtue of the attempted service of process through the Kentucky Secretary of State, Erma was notified of the institution of the action on or about July 31, 1969.

Apparently on the advice of its American parent corporation, Lear Siegler, Inc., Erma elected not to defend, and did not then notify INA that the suit had been instituted.

Much later, and on or about January 26, 1972, Erma notified INA of the litigation, and on March 2, 1972 INA formally denied coverage because, among other things, Erma had failed to give notice of Poyner's claim, and had allowed limitations to intervene as a bar to a claim for coverage.

Poyner filed a supplemental complaint against INA on July 5, 1973, seeking to enforce an alleged obligation of INA to satisfy the aforesaid default judgment he had obtained against Erma. INA filed an answer, asserting multiple defenses.

On June 30, 1977 INA filed a motion for summary judgment, supported by a memorandum, to which were attached multiple exhibits.

On **September 7, 1977** INA's motion for summary judgment was sustained, and **summary judgment was then entered** (Appendix, p. A20). A memorandum opinion, handed down simultaneously, **held that the default judgment against Erma was void because the Court lacked jurisdiction over Erma,** and, that being so, there was no valid basis for the claim against INA (Appendix, p. A1). Other defenses asserted by INA were not reached.

The United States Court of Appeals for the Sixth Circuit similarly limited its consideration to the jurisdictional question, that is, the question of whether or not the default judgment against Erma was void because the Court lacked personal jurisdiction of Erma.

In a determination of the jurisdictional question the history of the firearm and the status of Erma are important considerations.

Erma, a creature of the Federal Republic of Germany, was located in West Germany, and had no offices or assets in the United States of America.

Erma did not sell the firearm in Kentucky or in the United States of America. It sold the firearm to Wischo KG, of Erlangen, West Germany, on August 26, 1965. As a matter of fact, in that time area **all sales of Erma products were conducted in West Germany to two distributors, of which Wischo KG was one.**

The firearm eventually found its way into the hands of L.A., an independent dealer located in New York, New York, with facilities also located at Kinston, North Carolina. There is no showing of a sale from Erma to L.A.

L.A. sold the firearm to Stewart Bear, of Nashville, Tennessee on or about October 10, 1965. This is the last sale reflected by the record in the action, although at the time of Poyner's injury the firearm was owned by Lee Dyer, of Paducah, Kentucky.

In the first pleading filed by the Petitioner, INA, the jurisdictional question was raised, and the Petitioner continued to argue the point in the United States Court of Appeals for the Sixth Circuit. The pertinent defense in INA's responsive pleading in the United States District Court for the Western District of Kentucky was as follows:

> "At the time the judgment referred to in the supplemental complaint was entered against Erma Werke Gmbh (hereinafter, "ERMA"), this Court did not have jurisdiction of Erma, and Erma was not subject to service of process through the procedure employed by the plaintiff, and there was never issued any valid process against Erma, and there was never a valid service of process upon Erma, nor was there a valid return of service of process upon Erma. Accordingly, this Court was powerless to take any action affecting the rights of Erma, and the said judgment against Erma is void and of no effect."

Jurisdiction of Court of First Instance

The jurisdiction of the United States District Court for the Western District of Kentucky was originally invoked by Poyner on the basis of the diversity of the citizenship of the parties *(28 U.S.C. 1332).*

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit Ignored and Refused to Follow a Decision of the Supreme Court of the United States in a Case Involving Comparable Facts and Law

On January 21, 1980, this Court decided the case of *World-Wide Volkswagen Corporation* v. *Woodson*, —— *U.S.* ——, *62 L. Ed. 2d 490, 100 S. Ct.* ——. The very first paragraph of the decision would be a recitation applicable here if the State under consideration were Kentucky instead of Oklahoma, and if the article were a firearm instead of an automobile:

> "The issue before us is whether, consistently with the Due Process Clause of the Fourteenth Amendment, an Oklahoma court may exercise in personam jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma."

In the lower court the Honorable James F. Gordon treated the jurisdictional question exhaustively in his memorandum opinion of September 7, 1977 (Appendix, p. A1), and in his supplemental memorandum and order of November 16, 1977 (Appendix, p. A21), both of which are adopted, reiterated and incorporated herein by reference.

For the convenience of the Court, we are quoting again the pertinent parts of the Kentucky "long-arm" statute by which Poyner attempted to bring Erma before the Court:

> "*454.210.* **Personal jurisdiction of courts over nonresidents–Process, how served–Venue.**–(1) As used in this section, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who is a non-resident of this commonwealth.
>
> (2)(a) A court may exercise personal jurisdiction over a person **who acts directly or by an agent**, as to a claim **rising from** the person's:
>
> 1. Transacting any business **in** this commonwealth;
>
> **2.** Contracting to supply services or goods **in** this commonwealth:
>
> 3. Causing tortious injury by an act or omission **in** this commonwealth;
>
> 4. Causing tortious injury **in** this commonwealth by an act or omission **outside** this commonwealth **if** he **regularly does or solicits business,** or **engages in any other persistent course of conduct,** or **derives substantial revenue** from goods used or consumed or services rendered **in** this commonwealth, **provided** that the **tortious injury** occurring in this commonwealth **arises out of the doing or soliciting of business** or **a persistent course of conduct or derivation of substantial revenue within** the commonwealth;

> 5. Causing injury **in** this commonwealth to any person by **breach of warranty** expressly or impliedly made in the sale of goods outside this commonwealth **when the seller knew such person would use, consume, or be affected by,** the goods **in** this commonwealth, **if** he **also regularly does or solicits business,** or **engages in any other persistent course of conduct,** or **derives substantial revenue** from goods used or consumed or services rendered **in** this commonwealth;"

Looking now at the statute, and keeping in mind the history of the firearm and the status of Erma, as previously recited, note that Paragraph (2)(a) specifies that personal jurisdiction may be exercised over a person who acts either directly or by an agent. Certainly, **Erma did not act directly in Kentucky,** and **L.A. was not its agent.** Even Poyner recognized that, for when briefing the case in the United States Court of Appeals for the Sixth Circuit he referrd to L.A. as an "independent distributor".

Thus, Erma is eliminated by the specification of the first sentence in Paragraph (2)(a).

Going now to the first classification specified in Paragraph (2)(a), "Transacting any business in this commonwealth", **the entire record is utterly devoid of any evidence that Erma could have been so involved.** Thus, it would not have been possible for Poyner's claim to "rise" from such activity.

The **second and third classifications of paragraph (2)(a) are also obviously inapplicable to Erma,** (that is, contracting to supply services or goods in Kentucky,

and causing tortious injury by an act or omission in Kentucky).

Poyner obviously relied upon the fourth classification in Paragraph (2)(a) in claiming jurisdiction of the Court over Erma, but **there is no showing that Erma "regularly does or solicits business" in Kentucky, or "engages in any other persistent course of conduct" in Kentucky, or "derives substantial revenue from goods used or consumed or services rendered" in Kentucky.** Even though admitting that L.A. was an independent contractor, Poyner attempted to involve Erma through the actiivties of L.A., a subject with which we will deal hereinafter.

The feature of the quoted statute which makes it impossible to involve Erma, irrespective of Erma's status under the classifications discussed above, is that the tortious injury must have arisen "out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within" Kentucky. How could Erma have been involved when its only sale of the firearm was in West Germany, to a West Germany firm, and the last sale in the United States of America reflected by the record was to a resident of Nashville, Tennessee?

The fifth classification under Paragraph (2)(a) of the quoted statute, the one relating to breach of warranty, obviously excludes Erma because, as demonstrated above, Erma is outside the specifications of that classification, which correspond to the ones in the fourth classification. Furthermore, **there is no men-**

tion of breach of warranty in the allegations in the complaint against Erma.

Perhaps the following breakdown of the statute and the applicable facts will be helpful to the Court *(KRS 454.210)*:

(2) (a) A court may exercise personal jurisdiction over a person **who acts directly or by an agent,** as to a claim **rising from** the person's:

Erma did not act either directly or by an agent in Kentucky. L.A. was not its agent.

1. Transacting any business in this commonwealth;
   Erma was not so involved. Nothing to give "rise" to Poyner's claim.
2. Contracting to supply services or goods **in** this commonwealth;
   Erma was not so involved. Nothing to give "rise" to Poyner's claim.
3. Causing tortious injury by an act or omission **in** this commonwealth;
   Erma was not so involved. Nothing to give "rise" to Poyner's claim.
4. Causing tortious injury **in** this commonwealth by an act or omission **outside** this commonwealth **if** he **regularly does or solicits business,**
   Erma did not regularly do or solicit business in Kentucky. It sold only to two distributors in West Germany.

   or **engages in any other persistent course of con**duct,

> Erma engaged in **no** course of conduct whatsoever. Certainly no persistent course.

or **derives substantial revenue** from goods used or consumed or services rendered **in** this commonwealth,

> There was no showing of any revenue whatsoever from the specified sources.

provided that the **tortious injury** occurring in this commonwealth **arises out of the doing or soliciting of business** or **a persistent course of conduct or derivation of substantial revenue within** the commonwealth;

> Since the sale of the firearm by Erma was in West Germany, and since no sale of the firearm was effected in Kentucky, and since there was no showing of any other activity on the part of Erma in Kentucky, **the "tortious injury" could not have arisen** from the specified sources.

As stated above, Poyner seeks to hold Erma responsible for acts or omissions of L.A., although he admits that L.A. is an independent contractor. It is therefore **appropriate that we examine L.A. for the purpose of determining whether or not it would be embraced within the specifications of the "long-arm" statute.**

As stated before, **L.A.'s offices and facilities are located entirely outside the State of Kentucky.** It sells to distributors only, its **orders being filled in either New York or North Carolina.** It has a distributor in

Lexington, Kentucky, whose orders are filled in New York or North Carolina. This **Kentucky distributor** is Phillip Gall and Son, and it **is not L.A.'s purchaser of the firearm here concerned, Stewart Baer, of Nashville, Tennessee.**

The record shows that **L.A. has no employee, agent or person** in any other capacity **in the State of Kentucky,** and it **has not maintained an office in Kentucky,** it has **no telephone in Kentucky,** and **no bank account,** and **no real estate,** and **has not entered into any contract for the purchase or sale of merchandise in Kentucky. It does not have a warehouse or storage facility in Kentucky,** and it **has not shipped any merchandise into Kentucky on consignment.**

The sale by L.A. was to a man in Nashville, Tennessee. Accordingly, the **tortious injury could not have arisen out of the activities specified in the "long-arm" statute, which necessarily must have taken place in Kentucky to qualify.**

We thus see that, as with the automobile in *World-Wide Volkswagen Corporation* v. *Woodson, supra,* it was but by a fortuitous circumstance that the firearm manufactured by Erma found its way into Kentucky by the transient activity of its owner. Whatever result it produced was not by reason of any activities on the part of Erma or L.A. that meet the prerequisites of the "long-arm" statute.

World-Wide Volkswagen Corporation v. *Woodson, supra,* laid down an adequate and well-reasoned measuring stick which denied jurisdiction of World-Wide, and denies jurisdiction of Erma in this case. The

tenets of that decision were ignored and/or circumvented by the United States Court of Appeals for the Sixth Circuit, and were denied to Erma, all in contravention of the due process and equal protection provisions of the *Fourteenth Amendment.*

It was well stated in that opinion:

> "Thus, the Due Process Clause 'does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.' International Shoe Co. v. Washington, supra, at 319, 90 L. Ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. Hanson v. Denckla, supra, at 251, 254, 2 L. Ed. 2d 1283, 78 S. Ct. 1228."

Hanson v. *Denckla* Excludes Erma From the Jurisdictional Reach of Kentucky's "Long Arm" Statute

This Court laid down a standard that must necessarily exclude Erma from the jurisdictional reach of Kentucky *(Hanson* v. *Denckla, 357 U. S. 235, 2 L. Ed. 2d 1283, 78 S. C. 1228* [*1958*]*).*

> "The unilateral activity of those who claim some relationship with a nonresident defendant

> cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but **it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State,** thus invoking the benefits and protections of its laws."

In its opinion of March 28, 1980 the United States Court of Appeals for the Sixth Circuit posed to itself the question, "Has Erma purposefully availed itself of the privilege of acting in Kentucky or causing a consequence there?" That Court then answered the question in the affirmative, stating that rather than distributing its products in the United States through its own corporate organization it elected to utilize the services of an American based distributor, L.A. It went on to say that "Erma had an agreement with L.A. that the latter would be the sole United States distributor for Erma". The court then went on to recite the activities of L.A. that would affect its Kentucky contacts.

The record does not support the recited finding. Poyner was injured in February, 1968. The **firearm** was **sold** to Stewart Baer in Nashville, Tennessee in **October, 1965.** The **original sale** by Erma **to Wischo KG** was before that, in **August, 1965.** Keeping those dates in mind, consider that **it was not until sometime in 1973** that there were negotiations between Erma and L.A. regarding L.A.'s distributorship. In short, the 1973 relationship of Erma and L.A. was not in process

of negotiation until **after** the **sale** of the firearm, Poyner's **accident**, Poyner's **suit** and the **default judgment** against Erma.

It is thus obvious that the United States Court of Appeals for the Sixth Circuit was considering **a relationship that was not established until seven or eight years after Erma originally parted with the firearm.**

This is most important, in view of the specification in the Kentucky "long-arm" statute that the tortious injury jurisdiction is conditioned upon the regular doing or solicitation of business, or the engagement in any other persistent course of conduct, or the derivation of substantial revenue from goods used or consumed or services rendered in Kentucky, and, **of paramount importance, the tortious injury must have arisen out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within Kentucky. Thus, there could not possibly have been any connection between the business activities of Erma with respect to the sale of this particular firearm and the conditions imposed by the statute.**

How could the 1968 event (the injury of Poyner) have "arisen" from a relationship (with L.A.) that was not commenced until 1973? That is what the statute requires the plaintiff to demonstrate. And he cannot do so.

Poyner Ignored the Process Law of the Jurisdiction in Which Erma Resided, Taking the Position that Kentucky Law was Supreme

The service of process attempted upon Erma was by the procedure specified by *KRS 454.210(3)*,[1] quoted in full in the footnote, that is to say, by the serving of summons and an attested copy of the complaint upon the Kentucky Secretary of State, and by mailing thereof by the said Secretary of State to Erma. Under the law of the Federal Republic of Germany, such manner of service of process was totally ineffective, and this was established for the record by the opinion of an attorney of the Federal Republic of Germany.

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[1]*KRS 454.210(3)(a)* When personal jurisdiction is authorized by this section, service of process may be made on such person, or any agent of such person, in any county in this commonwealth, where he may be found, or on the secretary of state who, for this purpose, shall be deemed to be the statutory agent of such person. (b) The clerk of the court in which the action is brought shall issue a summons against the defendant named in the complaint and direct it to the sheriff of Franklin County. The sheriff shall execute the summons by delivering a true copy to the secretary of state and shall also deliver with the summons an attested copy of plaintiff's complaint. The secretary of state shall immediately mail the copy of the summons and complaint to the defendant at the address given in the complaint. The letter shall be posted by prepaid registered mail or by certified mail, return receipt requested and shall bear the return address of the secretary of state. The sheriff shall make the usual return to the court, and in addition the secretary of state shall make a return to the court showing that the acts contemplated by this statute have been performed, and shall attach to his return the registry receipt, if any. Summons shall be deemed to be served on the return of the secretary of state and the action shall proceed as proveded in the Rules of Civil Procedure.

According to the said attorney, specific steps are outlined in the applicable German Code of Civil Procedure *(§328 Code of Civil Procedure, I, 2, Federal Republic of Germany [ZPO])* for the establishment of jurisdiction over a German National, none of which were followed in this instance, and, by reason of the applicable law, as interpreted by the said attorney, jurisdiction over Erma was never established.

Due recognition of the law applicable in the jurisdiction in which the foreign defendant resided should have been afforded. In failing to do that, Poyner sacrificed the effectiveness of the "long-arm" statute, even if he could have shown that it was otherwise usable in this instance (which he could not have done).

While not directly in point, an analogy was possibly drawn in Section II of the opinion in *World-Wide Volkswagen Corporation* v. *Woodson, supra,* with references to the intent of the Framers of the United States Constitution that the several States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. Also, the sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States, a limitation express or implicit in both the original scheme of the *Constitution* and the *Fourteenth Amendment.*

In this same vein it should be recognized that the Federal Republic of Germany should have some control over attempts by other nations to exercise jurisdiction over its citizens by prescribing the method by

which process in such an instance should be served, and this is especially true when the procedure prescribed is not burdensome.

The United States Court of Appeals For the Sixth Circuit Denied to Erma the Equal Protection of the Laws by Failing to Follow Is Own Earlier Decision in a Corresponding Case

The United States Court of Appeals for the Sixth Circuit stated in its opinion of March 28, 1980, "We hold that the Kentucky Legislature has authorized the Kentucky courts to reach to the full constitutional limits in entertaining jurisdiction over non-resident defendants". It cited no Kentucky decisions to that effect, and, indeed, it could not have done so. **By the very terms of the "long-arm" statute sufficient restrictions are incorporated to obviate any such conception,** and the District Court so found. It is only the United States Court of Appeals for the Sixth Circuit that has come to such a conclusion. Its first pronouncement of a conclusion of that character was in *Davis H. Elliott Co., Inc.* v. *Caribbean Utilities Co., LTD, 513 F.2d 1176 (1975).*

The United States Court of Appeals for the Sixth Circuit chose to ignore its own opinion in *Velandra* v. *Regie Nationale Des Usines Renault, 336 F. 2d 292 (1964),* **in which it held that even though the manufacturer had three dealers in Detroit, "one of whom sells a 'substantial' number of Renaults, resuting in gross sales 'upward' of $100,000.00", and delivered express written warranties in its name to all purchasers,**

there was not sufficient evidence of "minimum contacts" with the State of Michigan to satisfy "traditional notions of fair play" so as to subject the manufacturer to the personal jurisdiction of the courts of Michigan.

And yet in the instant case **that same Court has held that the sale by Erma of a $36.65 firearm to a purchaser in West Germany, which eventually found its way through other sales to a purchaser in Tennessee, and was carried noncommercially to Kentucky, satisfies the requirements of the "minimum contacts" and the prescription of "traditional notions of fair play and substantial justice" of** *International Shoe Company* v. *Washington, 326 U. S. 310, 90 L. Ed. 95 (1945).*

This is a flagrant display of the unequal application of the law.

It should also be observed that in *Velandra* v. *Regie, supra,* the said Court was concerned with a "long-arm" statute that was much less restrictive than the Kentucky statute, albeit that Court later disclaimed that it intended to construe the Michigan statute *(May* v. *Atlas Magazines, Inc., 380 F.2d 58 [1967]).* But it cannot escape the fact that it was determining the validity of "long-arm" service, concerning which a statute was in effect *(Michigan Compiled Laws, § 600.715).* Note the language of that statute, and compare it to the language of the Kentucky statute:

> "Sec. 715. The existence of **any** of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record

of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation arising out of the act or acts which create any of the following relationships:

(1) The transaction of any business within the state.

(2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.

(3) The ownership, use, or possession of any real or tangible personal property situated within the state.

(4) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(5) Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant. P.A. 1961, No. 236, § 715, Eff. Jan. 1, 1963."

Regie was given a break that was denied to Erma.

The United States Court of Appeals for the Sixth Circuit Chose (and Misinterpreted) the Wrong Decision of the Kentucky Intermediate Appellate Court in Trying to "Guess" What the Highest Appellate Court Might Decide

The United States Court of Appeals for the Sixth Circuit sought to read into a Kentucky decision a recognition that *KRS 454.210(2)(a)(5)* "is to be interpreted as coextensive with the outer limits of due process"

(Volvo of America Corporation v. *Wells, Ky. App., 551 S.W.2d 826* [*1977*]*).* As previously stated, **this totally ignores the restrictions interposed in the statute itself.** Furthermore, *Volvo* v. *Wells, supra,* was so clearly wrong on its face that it should not be cited as authority. Certainly, it should not be cited as authority in this case, for **it concerned** the interpretation of the section of the Kentucky "long-arm" statute that related to **breach of warranty,** and **no breach of warranty was alleged by Poyner.**

Disregarding that aspect, the decision in *Volvo* v. *Wells, supra,* quoted the portion of the statute which contains the condition "when the seller **knew** such person would use, consume, or be affected by the goods in this Commonwealth". The decision went on to recite that the evidence showed that the defendants handled the manufacturing and distribution of Volvo Automobiles in the United States of America, and then stated, "Although this particular automobile was bought from a dealer in Huntington, West Virginia, it is not unreasonable to require the Volvo companies to be responsible for their product after the product enters the main stream of commerce. **It must be assumed** that these defendants-appellants **knew or should have known** that the vehicles they shipped to this particular dealer in Huntington, West Virginia, would be likely to end up being owned and driven by citizens and residents of the state of Kentucky, the state of Ohio, as well as West Virginia, - - ".

The Kentucky Court of Appeals admitted later in that decision that there was **no direct evidence that**

Volvo derived substantial profits from the sale of Volvo Automobiles in the State of Kentucky, but **"it must be assumed"** that it did.

Thus, the *Volvo* decision was, on its face, based upon assumption rather than proven facts.

The United States Court of Appeals for the Sixth Circuit admitted that Kentucky's highest court, the Kentucky Supreme Court, had not decided the question, and it correctly stated that, in such a situation, the decisions of the next highest court could be relied upon. However, it chose *Volvo* v. *Wells, supra,* as its authority in that respect, and totally ignored a later decision, and a well reasoned decision, which would have served as a much better guide *(Tube Turns Division of Chemetron Corporation* v. *Patterson Company, Inc., Ky. App., 562 S.W.2d 99* [*1978*]).

In *Tube Turns* v. *Patterson, supra,* the criteria set forth in *Southern Machine Company* v. *Mohasco Industries, Inc., 401 F.2d 374 (6th Cir. 1968)* were stressed significantly as applicable to an instance for the determining of the "outer limits of personal jurisdiction based upon a single act":

> "First, the defendant **must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state.** Second, the cause of action **must arise from the defendant's activities there.** Finally, the acts of the defendant or consequences caused by the defendant must have a **substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable."**

Applying these criteria in the instant case, it would be frivolous to say that Erma is before the court.

Tube Turns v. *Patterson, supra,* would have been the logical choice for an indication of what the Supreme Court of Kentucky would decide in a similar factual situation.

Incidentally, *Tube Turns* v. *Patterson, supra,* **rejected the broad application advanced in** *Davis H. Elliott Co., Inc.,* v. *Caribbean Utilities Co., Ltd., 513 F.2d 1176 (6th Cir. 1975),* and, making appropriate references to *International Shoe Company* v. *Washington, supra, Hanson* v. *Denckla, supra,* and, as aforesaid, *Southern Machine Company* v. *Mohasco Industries, Inc., supra,* **it declared that a corporation which had no office, no post office box, no telephone directory listing, no employees, no agents and no property in Kentucky did not, by reason of a single sale to it by a Kentucky seller, submit itself to the jurisdiction of a Kentucky court.**

Note the following language:

> "In this case, Patterson placed an order as a result of solicitations made by Tube Turns's representatives in Colorado. In the absence of proof that Patterson should have anticipated that its order with Tube Turns could have a substantial impact on commerce within Kentucky, it would be unreasonable and a denial of due process to require Patterson to defend this action in the Kentucky courts."

Not only did the United States Court of Appeals for the Sixth Circuit ignore *Tube Turns* v. *Patterson,*

supra, but it also ignored the following pronouncement in *International Shoe* v. *Washington, supra:*

> "Conversely it has been generally recognized that **the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.** St. Clair v. Cox, supra (106 U. S. 359, 360, 26 L. Ed. 226, 1 S. Ct. 354); Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 21, 51 L. Ed. 345, 350, 27 S. Ct. 236; Frene v. Louisville Cement Co. supra (77 App. D.C. 133, 134 F.2d 515, 146 A.L.R. 926), and cases cited. **To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process."**

Another Aspect of Denying to Erma the Protection Adjudged in Favor of a Party Similarly Situated in Another Case.

The author of the decision of the United States Court of Appeals for the Sixth Circuit, March 28, 1980, His Honor, Judge Phillips, also authored that Court's decision in *Etheridge* v. *Grove Manufacturing Company, 415 F.2d 1338 (1969),* which concerned the Kentucky "long-arm" statute as it existed prior to the enactment of the one with which we are here concerned, and in the 1980 opinion he stated that *Etheridge* v. *Grove,* held, "this new statute extends the permissible

scope of jurisdiction over out-of-state corporations with minimal contacts in Kentucky".

As a matter of fact, the old statute contained a restriction corresponding to one in the new statute, it referring to an action instituted against a "foreign" corporation "involving a cause of action arising out of or connected with the doing of business by such corporation in this state". It was there **held that Grove Manufacturing Company was not susceptible to service of process in an instance in which Grove sold a crane to a party in Tennessee, who later brought it into Kentucky.**

Grove was in the same position in that case as the one in which Erma finds itself in this case. The same restriction that protected Grove under the old statute applies equally to Erma under the new statute.

Equal protection of the laws?

We believe the answer to the failure to dispense equal justice lies in the fact that the United States Court of Appeals for the Sixth Circuit has chosen to apply the Kentucky "long-arm" statute in individual segments, ignoring the self-adhering other provisions that are integral parts of the whole.

This Court Must Speak Again on a Subject That Needs Clarification and Careful Exposition.

The multitude of cases in both the Federal Courts and the State Courts which have sought to resolve questions such as the one involved here have made nothing but mockery of the beautiful pronouncements in *International Shoe Company* v. *Washington, supra,*

and many of such Courts have eviscerated the true concept and intent originally embraced therein. This Court now needs to define and redefine the objective, and to establish some more firm standard than is now afforded by the many, many interpretive decisions which confuse more than help.

A good step in that direction was taken in *World-Wide Volkswagen Corporation* v. *Woodson, supra,* but more needs to be done. This Court needs to speak more often on the subject, and to treat differing factual situations, in order that there may be decisions which will better serve as the supreme authority, to be used in lieu of the multiple decisions of differing integrity and stature, any number of which can be picked for citation as authority for most any desired interpretation.

Again we ask that this Court compare carefully the position of *World-Wide Volkswagen Coporation* with the position of Erma. Erma had far less contact with Kentucky than World-Wide had with Oklahoma. It thus deserves the same relief that was afforded World-Wide.

CONCLUSION

The Petitioner needs and deserves a hearing on the merits. We are handicapped in presenting a full argument because of the absence of a record to which we can direct the attention of this Court. But we declare with assurance that upon adequate consideration of the case on the merits we will be able to justify to a greater extent the granting of relief comparable to that awarded to World-Wide Volkswagen Corporation.

We assert with sincerity and conviction that serious injustice will be done if this Petition for Certiorari is denied.

Respectfully submitted,

EARLE T. SHOUP
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Paducah, Kentucky 42001

Attorney for Petitioner

CERTIFICATION

I hereby certify that three copies of this Petition have been served upon all parties required to be served by Rule 33 of this Court by mailing the same, first class postage prepaid, as follows:
Williams, Housman & Sparks, 1700 Kentucky Avenue, Paducah, Kentucky 42001, attorneys for Joe Terry Poyner.
Erma Werke, Gmbh, 8060 Dachau, Johann-Ziegler-Str. 13/15, West Germany.

EARLE T. SHOUP

APPENDIX

PAGE

September 7, 1977, Memorandum Opinion and Order of United States District Court for the Western District of Kentucky, Paducah Division, in Civil Action No. 1981-P(G). A1

September 7, 1977, Partial Summary Judgment of the United States District Court for the Western District of Kentucky, Paducah Division, in Civil Action No. 1981-P(G). A20

November 16, 1977, Memorandum and Order of United States District Court for the Western District of Kentucky, Paducah Division, in Civil Action No. 1981-P. A21

March 28, 1980, Opinion of the United States Court of Appeals for the Sixth Circuit in No. 78-3105, by which the Partial Summary Judgment of the United States District Court for the Western District of Kentucky, Paducah Division, was reversed. A24

March 28, 1980, Judgment of the United States Court of Appeals for the Sixth Circuit. A38

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Civil Action No. 1981-P(G)

JOE TERRY POYNER, - - - - - *Plaintiff,*

v.

ERMA WERKE GmbH, and
L.A. DISTRIBUTORS, INC., - - *Defendant and Third Party Plaintiff,*

v.

INSURANCE COMPANY OF NORTH AMERICA,
et al., - - - - *Third Party Defendants,*

v.

ROBERT DYER and LEE DYER, - *Third Party Defendants.*

MEMORANDUM OPINION AND ORDER—Entered September 7, 1977

The Insurance Company of North America (hereinafter INA) has moved for summary judgment on a number of grounds. The Court will consider them as they appear in the motion. Summary judgment should be used with caution in a case of such complexity. *S. J. Groves* v. *Ohio Turnpike Commission,* 315 F.2d 824 (6th Cir. 1963). The evidence must be construed most favorably for the party opposing the motion. *Bohn Aluminum & Brass Corp.* v. *Storm King Corp.,* 303 F.2d 425 (6th Cir. 1962). A party cannot fall back on the pleadings in defending against such

a motion but must rely upon affidavits and other documentation in the record. *Bryant* v. *Commonwealth,* 490 F.2d 1273 (6th Cir. 1974).

JURISDICTION

INA urges that the initial default judgment against Erma Werke GmbH, is void because Erma did not have "minimum contacts" with Kentucky to justify submitting it to an *in personam* judgment. If the judgment against Erma is void, then INA would, of course, not be liable on its policy with Erma. Although default judgment was rendered against Erma in June of 1972, a challenge to the jurisdiction of this Court can be raised even now. Rule 12(h).

INA has chosen to rely upon the brief submitted by Lear Siegler (LSI) earlier in this case. Although the Sixth Circuit reversed this Court's earlier judgment against LSI, that Court specifically refused to rule on whether Erma's default could withstand this jurisdictional challenge. *Poyner* v. *Lear Siegler, Inc.,* 542 F.2d 955, 958 (6th Cir. 1976).

As jurisdiction is founded upon diversity, the law of the forum must be analyzed. *Erie Railroad* v. *Thompkins,* 304 U.S. 64 (1938); *Velandra* v. *Regie Nationale Des Usines Renault,* 336 F.2d 292 (6th Cir. 1964). The issue is 1) whether the Kentucky statute applies here and 2) if so, whether such application meets due process requirements. *Southern Machine Co.* v. *Hohasco Industries, Inc.,* 401 F.2d 374 (1968).

The Kentucky "long-arm" statute, KRS 454-210, provides for jurisdiction over a non-resident corporation under the following pertinent conditions:

> (2)(a) . . . claim arising from the person's
>
> 1. Transacting any business in this Commonwealth;

2. . . .

3. . . .

4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in the Commonwealth arises out of doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth;

5. Causing injury in this Commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this Commonwealth when the seller knew such person would use, consume, or be affected by, the goods in this Commonwealth, if he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth;

Plaintiff's complaint, filed some eight year ago, alleged both negligence and breach of warranty against Erma in the manufacture of a pistol. The threshold question is whether Erma fit the criteria of either Subsection 4 or 5 above in the conduct of its business such that jurisdiction existed.

Since Erma has not appeared in this suit, finding Erma's contacts with Kentucky has been a difficult task. Plaintiff basically depends upon the extensive business of L.A. Distributors throughout the United States as showing the foreseeability of Erma's products reaching Kentucky. Unfortunately, plaintiff has not, in all the years of this lawsuit, tracked down the actual dollar value of Erma's prod-

ucts sold in Kentucky. However, the record discloses a number of clues as to the scope of Erma's business both in Kentucky and the United States. For sake of convenience, page citations herein are to the Appendix for the Sixth Circuit in *Lear Siegler* v. *Poyner,* supra.

1) In admissions filed on September 23, 1968, LA admitted that it imported Erma .22 caliber pistols and distributed them in the United States in "certain areas". Erma's products "ultimately" found their way into Kentucky "through various jobbers and manufacturers' representatives not employed by L.A. Distributors, Inc." (App. p. 24-5). LA also admitted to advertising in magazines "circulated throughout the United States" although they denied having any salesmen "throughout" the United States. (P. 26).

2) LA's response in plaintiff's interrogatories, filed December 15, 1969, disclosed that LA sold only to wholesalers. LA maintained an office in New York City and a warehouse in North Carolina. LA further admitted that there was at least one distributor of its products in Lexington, Kentucky. LA solicited business in Kentucky "through mail order catalogues and phone calls, and at National Sporting Goods conventions in Chicago." LA admitted to advertising the "Erma .22 caliber pistol" in two magazines, presumably the ones mentioned earlier as of nationwide circulation. (P. 35).

LA also admitted that they employed one salesman in Tennessee on "a commission basis only for the State of Tennessee." This salesman was the one who eventually sold the pistol involved herein. Unfortunately, once again, plaintiff did not ask just where in Tennessee or other state this man may have worked, although, of course, the Court may take judicial notice that Tennessee and Kentucky share a common border for hundreds of miles.

3) Some insight into Erma was provided by Lear Siegler (LSI) in their responses to interrogatories filed January 8, 1973 (Pp. 55-66). Erma had no United States' office and no assets here. Erma employed some one hundred forty people in Germany. At least two products liability suits were then pending against Erma, one in Illinois and another in New York. During the period 1967 to 1969, Erma was insured by the defendant INA, an American corporation with offices in Germany.

In an affidavit attached to these responses, Joseph Larson of LSI stated that all advertising for Erma products was done by LA in LA's name. A separate affidavit by David Linehan also stated that LA did all advertising of Erma's products. Both men stated that Erma placed its products in commerce in West Germany by two distributors having no relationship to LSI. According to Larson, all initial sales (at the time the gun herein involved was sold) were from Erma to WISCHO KG, apparently one of the two distributors in Germany.

4) LSI's responses to plaintiff's second interrogatories, filed September 11, 1973, revealed that WISCHO KG was a distributor of sporting weapons. LSI further stated, upon information and belief, that "at some previous time L.A. Distributors was a customer of WISCHO KG." (P. 79).

LSI also mentioned that a Miami, Florida distributor, R.G. Industries, imported and sold Erma products "for a period of time." (P. 78).

When asked if Erma had ever employed counsel in the United States, LSI responded that no counsel had been "directly" so employed. (P. 85). LSI then admitted that some indirect representation had occurred in the past.

> Q. 57. Has the relationship of attorney-client existed between any attorney who business office is in

the United States and Erma Werke GmbH in regard to the claim of Joe Poyner?

A. Yes, LSI has from time to time appointed its counsel to represent the legal interests of Erma Werke GmbH in the United States.

This answer does not appear to be limited to this particular case and, when asked to divulge the names, etc., of such counsel, LSI made it clear that Erma had legal representation in this country before this lawsuit was filed.

Q. 58. . . .

(b) All of the counsel named in response to Question No. 53 have been employed by LSI since prior to the date of the incident upon which this lawsuit is based other than Mr. Coulter, who commenced employment on September 1, 1972.

Looking back to Question 53, which asked for names of LSI's counsel, LSI listed counsel "involved in this case who are or were full time employees of LSI . . .". Those listed and their place of business were as follows:

David Linehan .....California
W. O. Schmidt .....Michigan
R. R. Coulter .....California
Joseph Larson .....Michigan
Waller, Threlkeld & Whitlow....Paducah, Kentucky
O'Melveny & Myers .....California

Apparently, these same lawyers were also working on this particular claim, but all but Coulter had been employed prior to the "incident" behind the claim—in other words, since before 1968.

5) LSI supplemented their responses to plaintiff's first interrogatories on June 11, 1974. In answering whether

Erma had any assets in the United States, the following appeared along with the actual response that LA owed Erma some $30,000 as settlement from a $50,000 award in the German Courts.

> Erma Werke GMBH, hereinafter 'Erma', has sold and sells components of guns to a U.S. Corporation. Said components are delivered in West Germany, FOB West German port, and paid for in Germany on or before the date of shipment. The U.S. Customer pays all costs incurred in shipping and makes all arrangements necessary to import same into the United States of America. (P. 95).

6) LA admitted in a response filed January 3, 1975, that the $30,000 settlement between it and Erma also allowed LA to be the sole distributor for Erma, obviously in the United States. (P. 102-03).

7) In February of 1968, Mr. Bitner of LSI wrote Mr. Imperato of LA concerning a "recent board meeting at Erma Werke . . .". At this meeting "we discussed our situation once again concerning the relationship with L.A. Distributors." This discussion centered on the "possibility of L.A. Distributors purchasing Erma . . ." but the business situation then existing squelched the idea.

Meanwhile, LSI was seeking "wider sales of Erma products . . . to better exploit out talents and facilities at Dachau." Mr. Bitner had asked overseas LSI and Erma management personnel to "come back to you to resolve any agreement needed for the continuing distribution of Erma sport weapons in the United States." Based on these events, Mr. Bitner recommended that "once again we work on a one year or three year maximum basis." (P. 113-114).

8) In April of 1968, Erma was informed by LSI of some of the events in a products liability case in New York in 1966. LSI, through Mr. W. O. Schmidt, related that L.A.

Distributors was also sued, along with a couple of other distributors. As in this case, Erma was advised not to make a personal appearance. LA was referred to in this letter as Erma's "current exclusive United States importer . . .". (P. 114).

9) In a letter in May of 1971, Mr. Schmidt of LSI informed Erma that "Imperato" (of LA) had settled a "previous products liability suit" for $20,000. This letter also contained the following:

> In your letter to Mr. Bitner, you state that because Imperato has ignored our offer to take back his inventory and has sold these inventories, that therefore he does not have a counter-claim against us. (P. 121).

Whether the "our" and "us" refers to LSI alone or LSI and Erma together is not clear but it is certainly inferable that it refers to both LSI and Erma. Mr. Schmidt recommended that Erma not write Imperato "either for past or present distribution of Erma products in that United States . . .".

10) In an English translation of a letter from Erma to LSI in June of 1971, Erma complained that "the forwarding agency informed us . . . that goods shipped nine months ago are still within the New York customs." The problem stemmed from LA's refusal to "take over" these goods at New York.

In this same letter, reference was made to discussions with a "Mr. Haege from RG-Ind" about the "sale to employees of corporations in the United States." These sales had two problems, the need for a "special authorized importer and also the sale has to be executed through a L.A. licensed weapon dealer."

Finally, Mr. Schmidt of Erma (apparently no relation to the Schmidt at LSI) wrote that he would "for several reasons" come to the United States the following October.

He specifically mentioned visiting California and Miami. (P. 127).

11) The pistol involved in the plaintiff's accident was "supplied" by Erma to WISCHO KG on August 8, 1965, according to a letter from Erma to LSI in March of 1972. (P. 139). Erma claimed that they wanted to supply technical data for LA to LSI in defense of a lawsuit on Erma's guns.

12) In a letter dated April 14, 1972, Erma, through Karl Schmidt, told LSI that comments by LSI to "Miami influence our sales in a prohibitive way . . .". And that "The discussion of former business relations with third parties troubles a resurgence of our sales in the USA." (P. 146).

The above facts show that Erma was, at best, a strong backstage promoter of its products throughout the United States. Erma was certainly aware of LA's activities to sell Erma products. Yet, all sales were made in Germany; thus, income from Erma sales in the United States accrued only to LA, whatever the volume. Advertising of Erma products was done by LA. Distribution of Erma products was done by LA. These facts are certainly enough to show the widespread activities of LA distributors; however, they do not directly implicate Erma in any such activities. Plaintiff offers no evidence that LA is anything but an independent distributor. Despite the obviously strong interest of Erma in LA's activities, no real control of LA by Erma has been shown.

An initial inquiry is whether Kentucky has extended its statute to the limits of due process as that term was defined in *International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945). A state is not required to exercise the full extent of judicial power under due process if it does not choose to do so. *Perkins* v. *Benquet Consolidated Mining Co.,* 342 U.S. 437, 448 (1952). If the state does exercise

full jurisdiction, the two-step question posed at the beginning of this memorandum merges into one. *Southern Machine Company* v. *Mohasco Industries, Inc.*, supra, p. 376.

No Kentucky cases have construed the limits of the long-arm statute. However, in *Davis H. Elliot Co. Inc.* v. *Caribbean Utilities Co., Ltd.*, 513 F.2d 1176 (6th Cir. 1975), KRS 454.210(2)(a)1 it was held to be coextensive with due process. Referring to its prior dictum in *Etheridge* v. *Grove Manufacturing Co.*, 415 F.2d 1338 (6th Cir. 1969), the Court extended the "transacting any business" section as consistent with "minimum contacts" under *International Shoe Co.* v. *State of Washington,* supra, and its progeny.

The language of "transacting any business" is easily the broadest contained in the long-arm statute. (Some states have gone even further by legislating jurisdiction "to the full extent constitutionally permissible." *Gullet* v. *Qantas Airways, Ltd.*, 417 F.Supp. 490 (M.D. Tenn. 1977). Given the broad language of KRS 454.210(2)(a)1, the more restrictive language contained in Sections 4 and 5 of the same statute obviously shows a desire to limit what "contacts" will be in cases arising in tort or warranty. And these "contacts" are couched in language showing that more than "minimal" ones must exist. The use of "regularly", "persistent", "substantial", shows this clearly.

The Ohio and Kentucky long-arm statutes are very similar and both were modeled upon the Uniform Interstate and International Procedure Act. (See "Kentucky Long Arm Statute", Northern Kentucky Law Review, Vol. 4, No. 1, 1977, p. 67). The Ohio statute dealing with tortious injury was considered in *In-Flight Devices Corporation* v. *Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972). The Court noted that Ohio's "transacting business' section was coextensive with due process but that the "tortious injury" section was a retreat from the extremely broad jurisdic-

tional tenets of *Gray* v. *American Radiator and Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961).

> The reasons for the drafters' reluctance to follow *Gray* in the products liability field are not difficult to fathom. *Gray* accepted the proposition that a non-resident defendant becomes subject to the jurisdiction of the forum state when he does an act which he should anticipate will involve him with the state in such manner as to make jurisdiction reasonable. The Illinois Supreme Court held that such anticipation or expectation should properly exist whenever a manufacturer puts a product into the stream of national commerce for the ultimate interstate distribution. 466 F.2d at p. 230.

Characterizing many court decisions following the *Gray* rationale as bordering on "judicial imagination, more fictional than real", the Court went on to state that . . .

> In reaction to this gap between fiction and reality the courts and draftsmen of some long-arm acts have apparently sought to insure that some significant involvement with the forum state exists in those situations, such as the typical products liability case, where the reality of a defendant's expectations may be difficult to gauge. The somewhat restrictive language of subsection (A)(4) of the Ohio Act would seem the result of such approach. 466 F.2d at p. 230.

Ohio's Section (A)(4) statute is virtually the same as Kentucky's Section 4 and 5 in defining the activities necessary for jurisdiction.

Based on the language of the Kentucky statute and the *Van Dusen* analysis, the Court believes that Sections 4 and 5 of the long-arm are much more stringent than the "minimum contacts" reach of Section 1. Section 1 reaches

the constitutional limits but clearly Sections 4 and 5 require more substantial contacts by the foreign corporation. The Court now turns to whether Kentucky would apply jurisdiction here.

Post v. *American Cleaning Equipment Corporation,* Ky., 437 S.W.2d 516 (1969), KRS 271.610(2) was held to extend to a foreign manufacturer who "furnished" its products to two distributors in Kentucky even though "no specific contract of distributorship" existed. The elimination in strict liability cases of the privity concept was the crucial holding and, of course, the manufacturer did have direct contact with Kentucky.

Similarly, in *Penker Construction Co.* v. *Finley,* 485 S.W.2d 244 (Ky. 1972), the manufacturer had direct dealings with Kentucky companies in the sale of a crane that eventually caused injury in Kentucky.

District Courts sitting in Kentucky have given a fairly broad application to the Kentucky statute in products liability situations.

In *Miller* v. *Trans World Airlines, Inc.,* 302 F.Supp. 174 (E.D. Ky. 1969), the manufacturer of airline instruments was held amenable to service under parts 4 and 5 of the long-arm statute. The manufacturer's products were used in airlines nationwide and the Court held that the manufacturer "must have known" that plaintiff would "be affected by" the product in Kentucky.

Shortly after *Miller,* a swimming pool manufacturer in New Jersey was held not amenable to jurisdiction to process under KRS 271.610(2). The manufacturer had no office in Kentucky and plaintiff failed to provide any evidence as to advertising or ". . . the percent of its [manufacturers] business which ultimately is installed in Kentucky." *Irby* v. *All State Industries of North America,* 305 F.Supp. 772 at p. 775 (W.D. Ky. 1969).

In *Bennet* v. *Cincinnati Checker Cab Co., Inc.,* 353 F.Supp. 1207 (E.D. Ky. 1973), an importer was brought in as a third party defendant. The plaintiff had been shot while riding in a cab. The weapon was imported by Omega Co. of New York City. Omega's business in Kentucky was limited solely to mail-order shipments of firearms directly to licensed dealers in the state. Omega's Kentucky income amounted to less than 5% of its total income for the year of the accident.

The Court opined that Omega's contacts were sufficient under the Kentucky statute.

> . . . the Kentucky Court of Appeals might hold that Omega's conduct is within KRS 454.210, in accordance with its earlier statement that the quantity and nature of business required for jurisdiction is diminishing. 353 F.Supp. at p. 1209.

In the later case of *Bowen* v. *Eastside Jersey Dairy,* Ky. 521 S.W.2d 822 (1975), the court held that a dairy company was not amenable to service on the basis of two letters sent into Kentucky concerning an earlier wreck in Indiana. They held that the claim did not "arise out of" these letters as required by KRS 454.210(2)(a)1 and KRS 271.610(2). The Court refused to decide whether a claim could be constitutionally asserted on the basis of only two letters. Unfortunately, the Kentucky Supreme Court is still silent on the subject; however, the newly formed Court of Appeals has recently held that Volvo corporation was subject to process in Kentucky. *Volvo of America Corp.* v. *Wells,* Ky., 551 S.W.2d 826 (Ct. of App. 1977).

In that case, plaintiff, a Kentucky resident, purchased a Volvo from a Volkswagen dealer in Huntington, West Virginia. The car was delivered to plaintiff in Paintsville, Kentucky. Troubles developed with the car and eventually plaintiff brought suit for breach of implied warranty.

Volvo of America was brought in on an indemnity claim by the dealer in West Virginia. The Kentucky court held that jurisdiction over them was proper because the manufacturer and distributor should "be responsible for their product after the product enters the main stream of commerce." 551 S.W.2d at p. 827. The Court also noted that Volvo "knew or should have known" that vehicles shipped to Huntington would end up in Kentucky. More importantly, Volvo advertised in Kentucky and provided service through Volvo dealers in Kentucky. This was deemed sufficient to sustain *in personam* jurisdiction.

Based on these cases, it is by no means clear that Kentucky would assert jurisdiction here. In *Post, Penker,* and *Bennet* there were direct contacts with Kentucky dealers, distributors, jobbers, etc. In *Miller* the manufacturer was deemed to know that its components would directly effect Kentucky simply because those components were part of every airline in the country; thus, it was not necessary to prove direct dealings between the manufacturer and the state.

Additionally, *Miller* relied upon *Gray* v. *American Radiator & Sanitary Corp.,* supra, which was based on the much broader Illinois law. As *In-Flight Devices Corp.* v. *Van Dusen, Inc.* made clear, restrictive language in a long-arm statute (such as was present in Ohio's and which is present in Kentucky's) was meant to limit jurisdiction to less than that authorized by *Gray.* And even in *Miller,* the defendant's parent corporation was held not within the scope of jurisdiction.

Even the *Volvo* case is dubious precedent here since Volvo had direct contacts in advertising and dealerships in Kentucky. Thus, even relying partially upon an Illinois case which, in turn, was based upon the *Gray* case, some direct contact with the state was needed. Whether the Kentucky Supreme Court will accept no direct contacts under

the *Gray* case is doubtful due to its past reliance on at least some direct contacts as in *Post* and *Penker* and the *Van Dusen* analysis.

Even if Kentucky would assert jurisdiction here, the Court does not believe it would meet due process as that term has been defined in this Circuit. At most, these facts demonstrate that Erma was aware of LA's distribution of Erma products in the United States. However, all sales were made in Germany and LA was solely responsible for all advertising, soliciting, etc. in the United States. Plaintiff has not shown LA to be directly controlled by Erma such as to doubt the independence of LA. Erma's parent, LSI, also helped Erma's business in the United States. Although Erma certainly had an interest in sales of its products in the United States, the record is void of any direct contacts of Erma in Kentucky or even in the United States. Such facts make jurisdiction under Kentucky law extremely dubious; however, the Sixth Circuit would, under current case law, in any event refuse to ratify jurisdiction under the Kentucky statute consistent with due process.

In looking at the Sixth Circuit decisions, that Court has promulgated a test for the extent of due process jurisdiction under *International Shoe*. That test has three parts:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *Southern Machine Co.* v. *Mahasco Industries, Inc.*, supra, p. 381.

This standard has been acknowledged even by the Sixth Circuit as being perhaps overly restrictive but nonetheless in compliance with the *International Shoe* standards. See *In-Flight Devices Corporation* v. *Van Dusen Air, Inc.,* supra, 466 F.2d at p. 226 n. 11 (6th Cir. 1972).

Prior to the *Southern Machines* case, in *Velandra* v. *Regie Nationale Des Usines Renault,* 336 F.2d 292 (6th Cir. 1964), the defendant Regie was a French automobile manufacturer. Plaintiff suffered personal injuries and sued Regie for injuries suffered in Michigan from a car Regie built that was sold to plaintiff in Ohio. Regie's exports were done by a wholly owned subsidiary and that subsidiary owned the distributor in Illinois. The Illinois distributor sold to three dealers in Detroit, one of which sold some $100,000 of vehicles in Michigan. This was held not to be "minimum contacts" by Regie.

However, in the *Southern Machine Co.* v. *Mohasco* case, the Court specifically referred to *Regie* as a restriction when assessing the "*sine qua non* for *in personam* jurisdiction: Has Mohasco purposefully availed itself of the privilege of transacting business in Tennessee." 401 F.2d at p. 381-382. In explaining this first element of the test, the Court stated that the defendant corporation need not be physically present in a state. Soliciting insurance by mail, transmitting radio broadcasts into the state, or sending news periodicals to independent contractors who sold to consumers, were three cited examples. But the Court made clear that the defendant corporation *itself* had to be performing such acts before they could be considered. The key was foreseeability that such a transaction or "contact" would cause consequences in that state. After noting that *Mohasco* had dealt "directly" with a corporation in the forum state, the Court stated:

> A purposeful contact might be more difficult when the defendant deals in the state only indirectly through independent subsidiaries. 401 F.2d at p. 374, n. 25.

Immediately after this sentence the *Regie* case was cited, along with the admonition that the separation must be "real" and not "superficial".

Cases since *Regie* and *Southern Machine Co.* have extended the reach of long-arm statutes, but all these extensions still seemed based upon at least some direct "contact" by the defendant corporation with the forum state. For example, in *King* v. *Hailey Chevrolet Co.*, 462 F.2d 63 (6th Cir. 1972), the defendant advertised in the forum state and its agreement to repair a truck "directly involved" two forum state corporations. Thus, jurisdiction was upheld under Tennessee's "transacting business" statute, which, (like Kentucky's) extended to the limits of due process. 462 F.2d at p. 66-7.

In the *Van Dusen* case, supra, the defendant contracted with a firm "which it necessarily knew was based in Ohio and had its production facilities located within that state." 466 F.2d at p. 227. The Court also decided that a "business tort" could be properly asserted under the "transacting of business" part of the long-arm statute (which was coextensive with due process) rather than the more restrictive "tortious injury" part of the same statute. The Court entertained "serious doubts" that these same contacts would suffice under the latter part. 466 F.2d at p. 220.

In the recent case of *Davis H. Elliot Co. Inc.* v. *Caribbean Utilities Co., Ltd.*, supra, jurisdiction under Kentucky's "transacting any business" section was upheld. Plaintiff, a Virginia corporation, and defendant, a British corporation, negotiated a contract about construction work in the Caribbean Islands. This contract was mailed to defendant's counsel whose office was in Kentucky. Subsequently, a meeting was held in the attorney's office to resolve contract disagreements. Later, plainiff sued in the federal court in Kentucky.

Interpreting KRS 454.210(2)(a)1 as coextensive with due process, jurisdiction was upheld. The Court made clear that defendant's claim of no consequences being "reasonably foreseeable when the agreement was made" was too narrow. Defendant's contacts with the forum were sufficient, consistent with due process, for Kentucky to support jurisdiction.

These cases all gradually expand the limits of what contacts are coextensive with due process in the context of "transacting any business". All of them relied upon some direct contact by the defendant, no matter how slight. In this sense, these cases are consistent with the Kentucky cases which also expand jurisdiction so long as at least some direct contact exists.

Even in *Duple Motor Bodies, Ltd.* v. *Hollingsworth,* 417 F.2d 231 (9th Cir. 1969) wherein a British manufacturer was held amenable to service in Hawaii, the defendant had direct contact with the Hawaiian citizens about performance, albeit in London. The subject matter of the contract was obviously meant to effect Hawaii and spare parts were shipped there directly from the manufacturer.

As an overview, the recent case of *Shaffer* v. *Heitner,* ____ U.S. ____, (slip op. June 24, 1977) might very well signal a retreat from the optimal limits of cases such as *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957). Although establishing "minimum contacts" for both *in rem* and *in personam* actions, the Court held that the defendants could not be sued in Delaware despite their having incorporated in that state.

Thus, with the single exception of the *Miller* case, every state, federal district, and federal circuit court case herein cited on this subject requires at least some direct contact by the defendant before jurisdiction will attach. And most of these cases involved interpretations of the much broader "transacting business" standard—a standard that is co-

extensive with due process while Kentucky's statute here is the more restrictive tortious injury and/or implied warranty one. Under *Regie,* Erma cannot be equated with L.A. Distributors; therefore, Erma does not have any contacts with Kentucky at all. Thus, the Court does not believe Kentucky would extend its long-arm statute to this case and were they to do so it would not comport with due process as defined in this Circuit.

IT IS ORDERED that the default judgment against Erma Werke, GmbH, is VOID for lack of personal jurisdiction.

IT IS FURTHER ORDERED that Insurance Company of North America's motion for summary judgment be SUSTAINED, and the action against INA be dismissed.

Dated: September 6, 1977

(s) James F. Gordon
Senior United States District Judge

Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Civil Action No. 1981-P(G)

JOE TERRY POYNER, etc., - - - - *Plaintiff,*

v.

ERMA WERKE GmbH, and
L.A. DISTRIBUTORS, INC., - - *Defendant and Third-Party Plaintiff,*

v.

LEE DYER and ROBERT DYER, - *Third-Party Defendants,*

v.

INSURANCE COMPANY OF NORTH AMERICA, - - - - *Defendants to Supplemental Complaint.*

PARTIAL SUMMARY JUDGMENT—Entered September 7, 1977

For all the reasons stated in the Memorandum Opinion of this day,

IT IS ORDERED AND ADJUDGED that the motion of Insurance Company of North America for summary judgment be, and the same is hereby, SUSTAINED, and the action against Insurance Company of North America is DISMISSED.

Pursuant to Federal Rule of Civil Procedure 54(b), the Court expressly determines that there is no just reason for delay, and designates this to be a FINAL JUDGMENT as to the claims dismissed above.

September 6, 1977.

(s) James F. Gordon
Senior United States District Judge

Copies to:
Counsel of record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Civil Action No. 1981-P

JOE TERRY POYNER, etc., - - - - *Plaintiff*

v.

ERMA WERKE GmbH, and
L.A. DISTRIBUTORS, INC., - - *Defendant and Third-Party Plaintiff*

v.

LEE DYER and ROBERT DYER, - *Third-Party Defendants*

v.

INSURANCE COMPANY OF NORTH AMERICA, - - - - *Defendants to Supplemental Complaint*

MEMORANDUM AND ORDER—Entered November 16, 1977

This matter comes on on the motion of the plaintiff seeking that we alter and amend our partial summary judgment of September 7, 1977, dismissing this action as against INA; alter and amend so as to allow: (a) the partial summary judgment be held in abeyance pending further proof, and/or (b) to allow an appeal with respect to the plaintiff's claim against INA at such later date as the remainder of the action is completed in District Court.

By way of explanation of our partial summary judgment of September 7, 1977, may we state that we felt the trend showed that jurisdiction would have been proper except for

the *Velandra* case; although *Velandra* probably should no longer stand, we as a District Court are not empowered to overrule it. Even plaintiff, in its present memorandum, admits that *Velandra* is an obstacle, albeit a "dated milestone." We are inviting the Sixth Circuit to really look closely at their approach to long arm statutes. It was, and is, a close question. But we didn't then (September 7, 1977), and still do not now, believe that Erma has enough contacts with Kentucky.

Plaintiff maintains under our reasoning Erma will not be sued anywhere. Not so. Those states having long arm statutes like the Illinois' statute would assert jurisdiction, as they follow the "stream of commerce" theory closely. However, we felt, from reading the *Van Dusen* case, that the Sixth Circuit was giving a clear signal that they would not follow such a broad reading. To do so means they must get around *Velandra* and the other cases cited by us in the partial summary judgment of September 7, 1977. Each case seems to stand, notwithstanding plaintiff's citations (which are, incidentally, a little late in terms of apprising us of the law) that at least some direct contact by the manufacturer must be made in the forum state. Admittedly, that contact doesn't have to be much. Advertisements, solicitations for business, et cetera. But, as we recall, all that was shown was that LA did some advertising and that LA dealt with one wholesaler in Kentucky. Hardly, in our judgment, a "substantial" business, as required by the Kentucky Revised Statutes even if it were Erma doing so.

As to Kentucky, we do not think its Supreme Court would uphold jurisdiction here. Although the Volkswagen case seems to lean that way, it looked to us that such was an extending of the law further than the Supreme Court of Kentucky had done in the past, or will do in the future. That case went to the due process limits and every previous

case by the Kentucky Supreme Court has stopped way short of that end; so has the Sixth Circuit—at least both Courts have stopped short when dealing with foreign manufacturers shipping things through commerce. Both Courts have extended the limits of due process under the "doing business" part of statute—something that Erma certainly was not doing here.

The Tennessee long arm statute is much broader than that of Kentucky. They have, we believe, a special subsection that allows jurisdiction over anybody for anything to the extent of constitutional law. We came upon several Tennessee cases but discounted them because the Tennessee long arm statute was so much broader than Kentucky's. It was even broader than the Illinois law. This, we believe, is why the *Kroger* case is so contrary to the *Velandra* case.

As to the factual issue of how much revenue Erma gets out of its Kentucky sales, that was a tough one also. It could make a difference. But, under the *Bryant* case, we felt plaintiff had plenty of chances over the years to develop this but did not.

As to the matter of not specifying our ruling a final judgment so plaintiff won't have to do piecemeal appeals, we do not consider that action fair to INA. We designated it a partial summary judgment simply because it dismissed INA and left the other parties. We consider the plaintiff to be the cause of the piecemeal litigation here in the first instance for dropping everything else several years ago and trying to enforce the default against Erma.

Accordingly, the motion of plaintiff is hereby OVERRULED.

So ORDERED.

Date: November 16, 1977

(s) James F. Gordon
Senior U. S. District Judge

Copies to:
Counsel of record.

No. 78-3105

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOE TERRY POYNER, - - - *Plaintiff-Appellant,*

v.

ERMA WERKE GMBH and
INSURANCE COMPANY OF NORTH
AMERICA, - - - - *Defendants-Appellees.*

APPEAL from the United States District Court
for the Western District of Kentucky

OPINION—Decided and Filed March 28, 1980

Before LIVELY and KEITH, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge. This is a products liability action instituted by Joe Terry Poyner (Poyner), against Erma Werke Gmbh (Erma), a Germany based manufacturer of firearms, and L.A. Distributors, Inc. (L.A.), a New York based distributor of Erma products.

In February, 1968, at age 16, Poyner was injured by a bullet wound inflicted from an Erma manufactured .22 caliber semi-automatic pistol. He is now a paraplegic.

In July 1969, Poyner instituted suit against Erma and L.A. Service of process was accomplished against Erma in Dachau, Germany, by virtue of the Kentucky long-arm statute, KRS § 454.210. Apparently on the advice of its American based parent corporation, Lear Siegler, Inc.. (LSI),

Erma decided not to respond to the suit. Erma apparently did not give timely notice to its liability insuror, the Insurance Company of North America (INA), of the pending action. Because no defense was made, Poyner obtained a default judgment in June of 1972 for $398,830.77 in damages.

By supplemental complaint, Poyner added LSI and INA as additional defendants. The district court held LSI liable under the default judgment. We reversed in *Poyner* v. *Lear Siegler, Inc.*, 542 F.2d 955 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977), on the ground that the separate corporate identities of LSI and Erma could not be disregarded.

Thereafter, INA filed a motion for summary judgment asserting numerous grounds for such relief. In September 1977, the district court granted the motion on the ground that the default judgment against Erma was void for lack of *in personam* jurisdiction over Erma and, therefore, there was no valid basis for a claim against INA.

In its motion for summary judgment, INA contended, *inter alia*, that the default judgment against Erma is void on jurisdictional grounds because Erma did not have "minimum contacts" with Kentucky sufficient to justify *in personam* jurisdiction over Erma.

It is well settled that, subject to the requirements of the due process clause of the Fourteenth Amendment, federal courts in diversity actions must look to applicable state law to determine the extent of their personal jurisdiction. *Erie Railroad* v. *Thompkins*, 304 U.S. 64 (1938). Because the *in personam* jurisdictional reach of a federal district court in a diversity action is determined by the law of the state in which it sits, *Smartt* v. *Coca-Cola Bottling Corp.*, 318 F.2d 447 (6th Cir. 1963), we look to Kentucky law to determine the power of a Kentucky court to bind Erma by a judgment *in personam*. This requires an answer to two questions:

1. Has the Legislature of the Commonwealth extended the jurisdictional reach of its courts to non-resident defendants such as Erma? and, 2. Can the jurisdictional reach of those courts be extended to Erma consistent with due process as that concept is delineated in the "minimum contacts" formula of *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), and its progeny?[1] If the Kentucky Legislature has authorized the Kentucky courts to reach to the full constitutional limits in pursuing non-resident defendants, these two inquiries become one. *Southern Machine Co.* v. *Mohasco Industries, Inc.,* 401 F.2d 374 (6th Cir. 1968).

We answer both of these inquiries in the affirmative, reverse the jurisdictional holding of the district court and remand this cause for further proceedings.

I

We look first to the language of the Kentucky long-arm statute. Because Poyner alleged both negligence and breach of warranty against Erma, KRS §§ 454.210(2)(a) 4 and 5[2]

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[1] *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957); *Hanson* v. *Denckla,* 357 U.S. 235 (1958); *Shaffer* v. *Heitner,* 433 U.S. 186 (1977); and, most recently, *World-Wide Volkswagen Corp.* v. *Woodson,* ____ U.S. ____, 48 U.S.L.W. 4079 (Jan. 21, 1980).

[2] KRS § 454.210 reads in pertinent part:

(2)(a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

* * *

4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises

(Footnote continued on following page)

are the statutory provisions in issue. Both are written in the disjunctive.

KRS § 454.210(2)(a)4 provides that a "person," which pursuant to KRS § 454.210(1) includes a corporation, cause tortious injury in Kentucky by

1. an act *or*
2. omission outside Kentucky

IF

1. he regularly does *or*
2. solicits business *or*
3. engages in a persistent course of conduct *or*
4. derives substantial revenue from goods
   a. used *or*
   b. consumed *or*
   c. services rendered in Kentucky

PROVIDED that the injury arises out of

1. the doing *or*
2. soliciting of business *or*
3. a persistent course of conduct *or*
4. derivation of substantial revenue in Kentucky.

KRS § 454.210(2)(a)5 is somewhat similar to KRS § 454.210(2)(a)4 but rests on breach of warranty. It ex-

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(Footnote continued from preceding page)

out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth;

5. Causing injury in this Commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this Commonwealth when the seller knew such person would use, consume, or be affected by, the goods in this Commonwealth, if he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth;

tends jurisdiction against a corporation which causes an injury in Kentucky by breach of warranty in the sale of goods outside Kentucky when

1. the seller knew such person would
   a. use,
   b. consume *or*
   c. be affected by the goods in Kentucky

IF

1. he also regularly
   a. does *or*
   b. solicits business *or*
   c. engages in a persistent course of conduct *or*
   d. derives substantial revenue from goods
      1) used *or*
      2) consumed *or*
      3) services rendered in Kentucky.

KRS § 454.210 became effective on June 13, 1968. Prior to that time, KRS § 271.610 (1946) governed the service of process in Kentucky. This court interpreted KRS § 454.210 in *Etheridge* v. *Grove Manufacturing Co.*, 415 F.2d 1338, 1340 (6th Cir. 1969), and held: "this new statute *extends* the permissible scope of jurisdiction over out-of-state corportions with minimal contacts in Kentucky." (Emphasis supplied.)

It is clear that the Kentucky Legislature, in enacting the "new and broader" KRS § 454.210, intended to extend the permissible scope of jurisdiction over foreign corporations with minimal contacts in Kentucky, which previously could have been sued in Kentucky courts only in "a cause of action arising out of or connected with the doing of business by such corporation in [Kentucky]," KRS § 271.610(2). In *Etheridge* we noted:

In enacting the 1968 statute, the Kentucky Legislature recognized the narrowness and restrictiveness of the 1946 law. The caption and preamble of the 1968 statute is as follows:

> "AN ACT relating to jurisdiction of the Courts of Kentucky.
>
> "WHEREAS, persons have acted directly and through agents in the Commonwealth of Kentucky.
>
> "WHEREAS, those persons have caused injury and property damage and financial inequities in the Commonwealth.
>
> "WHEREAS, remedy cannot presently be had against those persons in our Courts due to their nonresidence within the Commonwealth.
>
> "WHEREAS, the progress and tranquillity of our Commonwealth can be best assured through the complete settlement of disputes."
>
> Kentucky Acts 1968, p. 152.

415 F.2d at 1340-41.

Further, the Court of Appeals of Kentucky, then the highest court of the Commonwealth, in *Ford Motor Credit Co.* v. *Nantz,* 516 S.W.2d 840 (Ky. 1974), in discussing the long-arm's venue provisions, KRS § 454.210(4), recognized that "KRS § 454.210 was designed to extend the permissible scope of jurisdiction over foreign corporations with minimal contacts in Kentucky." *Id.* at 842, citing *Etheridge, supra.*

Recently, the Kentucky Court of Appeals, now the intermediate appellate court, in *Volvo of America Corporation* v. *Wells,* 551 S.W.2d 826 (Ky. App. 1977), recognized that KRS § 454.210(2)(a)5 is to be interpreted as coextensive with the outer limits of due process. In upholding the constitutionality of KRS § 454.210(2)(a)5, the *Volvo* court

quoted *Keckler* v. *Brookwood Country Club,* 248 F.Supp. 645, 649 (N.D. Ill. 1965):

> When a manufacturer voluntarily chooses to sell his product in a way in which it will be resold from dealer to dealer, transferred from hand to hand and transported from state to state, he cannot reasonably claim that he is surprised at being held to answer in any state for the damage the product causes. Nor can he deny the substantial interest of the injured person's state in providing a convenient forum for its citizen.
>
> *Volvo, supra,* at 828.

Volvo of America Corporation was held to be subject to *in personam* jurisdiction pursuant to KRS § 454.210(2)(a)5 because "it [is] not unreasonable to require the Volvo companies to be responsible for their product after the product enters the main stream of commerce." *Id.* at 827. The court assumed that defendants knew or should have known that cars shipped to a Huntington, West Virginia, dealer might be sold in Kentucky. Further, Volvo advertised in Kentucky and authorized dealer service in the Commonwealth. This was held to qualify for *in personam* jurisdiction under the section of the statute requiring that "he regularly does or solicits business" and "engages in a persistent course of conduct."

The *Volvo* court noted at 828:

> If the contentions of the defendants-appellants in this case were upheld there would be no way that you could have a products liability case or breach of warranty case brought in any state except where the manufacturer or distributor of the product had its place of business. Certainly that would be an illogical and unfair doctrine and contrary to the trend of the federal cases on this particular point.

It is amply clear that although the Kentucky Court of Appeals no longer is the court of last resort in Kentucky, its pronouncements constitute the rule of decision when it has not been expounded by the highest court of the state, *Fidelity Trust Co.* v. *Field,* 311 U.S. 169, 177 (1940). The decision of the Kentucky Court of Appeals should be followed by a federal court in deciding a question controlled by the law of the Commonwealth. *See also Simpson* v. *Jefferson Standard Life Insurance Co.,* 465 F.2d 1320, 1323 (6th Cir. 1972).

When a state legislature authorizes *in personam* jurisdiction over a non-resident defendant, that jurisdiction must be consistent with due process as delineated in the "minimum contacts" formula of *International Shoe Co.* v. *Washington, supra,* and its progeny. *International Shoe* held that:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."
>
> 326 U.S. at 316.

Three criteria have been delineated for determining the limits of due process within the "minimum contacts" formula of *International Shoe:*

> From these two cases,[3] three criteria emerge for determining the present outerlimits of *in personam* juris-

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[3]The two cases referred to are *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957), and *Hanson* v. *Denckla,* 357 U.S. 235 (1958). The former upheld jurisdiction where the suit was based on a contract which had substantial connection with the state.

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> diction based on a single act. First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. (Footnote omitted.)
>
> *Southern Machine Co.* v. *Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968).

Has Erma purposefully availed itself of the privilege of acting in Kentucky or causing a consequence there? We find that it has. Erma is located in Germany. It is a wholly owned subsidiary of its American parent corporation, LSI. Rather than distributing its products in the United States through its own corporate organization, Erma elected to utilize the services of an American based distributor, L.A. The use of an independent distributor so that the manufacturer is only indirectly responsible for the product reaching an injured consumer, in and of itself, will not insulate a non-resident foreign corporation from suit. *Eyerly Aircraft Co.* v. *Killian*, 414 F.2d 591 (5th Cir. 1969).

L.A. is a New York based distributor of Erma products. Although Erma engaged other distributors at times unspecified in the record, the record reveals that Erma had

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(Footnote continued from preceding page)

The latter held that an interest in the plaintiff or an interest in the cause of action are not by themselves sufficient to justify *in personam* jurisdiction over a non-resident defendant. *Hanson* admonished that to satisfy the requirements of due process, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson, supra*, 357 U.S. at 253.

an agreement with L.A. that the latter would be the sole United States distributor for Erma. The record also shows Erma's efforts to maximize sales in the United States and that the district court found Erma to be "a strong backstage promoter of its products throughout the United States." L.A. conducts nationwide advertising. It sells to a distributor in Lexington, Kentucky, has a salesman in Tennessee and a warehouse in North Carolina, all capable of selling to or servicing customers in Kentucky. L.A. also has solicited business in Kentucky through telephone calls and mail order catalogues. The district court specifically found that "Erma was certainly aware of LA's activities to sell Erma products." We have little difficulty in finding that Erma has purposefully availed itself of the privilege of acting in Kentucky or causing a consequence there.

Did this cause of action arise from Erma's activities in Kentucky? The pistol admittedly was manufactured by Erma. In its brief, Erma asserts that the firearm was sold by L.A. to Stewart Bear of Nashville, Tennessee, which was the last sale reflected by the record, although the firearm was owned by Lee Dyer of Paducah, Kentucky, at the time of Poyner's injury. The brief then asks "Query: Where and from whom did he buy it?"

What Erma has failed to mention is that Stewart Bear of Nashville, Tennessee, is a salesman for L.A., employed on a commission basis. In light of the relationship between Erma and L.A. and between L.A. and Stewart Bear, we find it more probable than not that this cause of action arose from Erma's activities in Kentucky.

Lastly, did the acts or consequences caused by the defendant have a substantial enough connection with the forum state to make the exercise of jurisdiction over Erma reasonable? Again, we answer this question in the affirmative. The issue is whether Erma has such "minimum contacts" with Kentucky that the exercise of *in personam*

jurisdiction will not offend "traditional notions of fair play and substantial justice." *International Shoe, supra,* 326 U.S. at 316. The term "contacts" covers a myriad of factors. As we stated in *Velandra* v. *Regie Nationale Des Usines Renault,* 336 F.2d 292, 295 (6th Cir. 1964):

> The existence or non-existence of the necessary "minimum contacts" to justify the upholding of personal jurisdiction over foreign corporations under the Fourteenth Amendment as interpreted in the International Shoe Company case must obviously be worked out with reference to the facts of a particular case rather than in a statement of dogmatic rules of all-inclusive principles.

However, as recently stated in *World-Wide Volkswagen Corp.* v. *Woodson,* ____ U.S. ____, 48 U.S.L.W. 4079, 4081 (Jan. 21, 1980):

> The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

Under *International Shoe, supra,* 326 U.S. at 317, the protection against inconvenient litigation rests on the relationship between the defendant and the forum which must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." Pursuant to *McGee, supra,* the burden on defendant will be considered in light of other relevant factors, including the forum state's interest in adjudicating the dispute. *See also World-Wide Volkswagen, supra.* We hold

the interest of the Commonwealth in adjudicating this dispute to be an important factor in the resolution of the issue at bar.

The course of international trade has changed dramatically since the close of World War II. The United States has become a much sought after market for industries of other nations. The influx of foreign goods to our shores greatly altered the balance of trade during the 1970's and many foreign enterprises dominate our markets against their American competitors.

We conclude that we are not required to deny jurisdiction under the facts at bar on the basis of *Velandra* v. *Regie Nationale Des Usines Renault,* 336 F.2d 292 (6th Cir. 1964). Given the inherently dangerous nature of the instrumentality in question, *Velandra, supra,* 336 F.2d at 298, the historical trade developments recognized in *McGee, supra,* n. 1 at 222-23 and *World-Wide Volkswagen, supra,* n. 1, the language of the Kentucky Legislature in enacting KRS § 454.210, and the broadening of jurisdictional concepts, it is important that cases involving this issue be resolved on their individual merits on a case-by-case basis.

As recognized in both the majority and dissenting opinions in *World-Wide Volkswagen, supra,* modern transportation and communication have facilitated this process, greatly increasing the amount of business conducted across sovereign boundaries. *See also McGee, supra.* As recognized in *McGee* this growth in markets, transportation and communication, in effect, have also made it much less burdensome for a party to defend himself in a state where he engages in economic activity.

While minimum contracts also serve the related function of checking the jurisdictional reach of coequal sovereigns in a federal system, the impact of such a purpose is minimized in an international setting as opposed to interstate operations.

We hold that the Kentucky Legislature has authorized the Kentucky courts to reach to the full constitutional limits in entertaining jurisdiction over non-resident defendants. We further hold that Erma has sufficient contacts with Kentucky, as hereinabove discussed, to bring it within KRS § 454.210(2)(a)4 and 5 as to doing or soliciting business or engaging in a persistent course of conduct in Kentucky. We also find that the minimum contacts of Erma with Kentucky fall within the constitutional limits of due process as enunciated by *International Shoe* and its progeny. Erma purposefully availed itself of the privilege of conducting business within Kentucky, thus invoking the benefits and protections of its laws. Injuries caused by inherently dangerous articles imported through independent distributors certainly fall within that class of litigation with which the forum state has a deep interest in adjudicating. Given Erma's contacts with Kentucky and balancing the plaintiff's interest and ability to adjudicate his cause and obtain effective relief as against Erma's burden of litigating this matter in Kentucky, we conclude that it is reasonable and fair to require Erma to litigate the action in Kentucky.

In summary, a foreign corporation, Erma, manufactured a dangerous weapon (a gun which is alleged to have made plaintiff a paraplegic), and sold it in the United States through an American distributor. Now the insurer (INA) of the German manufacturer tries to say that since Erma is not "present", neither Erma nor its insurer can be accountable for an alleged defective product. The tragic injury to appellant occurred in Kentucky. Erma was served process under the Kentucky long-arm statute and ignored it. Just as a court of the Commonwealth was held to have jurisdiction in an action involving a Volvo automobile sold in West Virginia, *see Volvo of America* v. *Wells, supra,* 551 S.W.2d 826 (Ky. App. 1977), we hold that the jurisdiction of the district court under the Kentucky long-arm stat-

ute is not affected by the fact that the last recorded sale of the gun was made in Tennessee.

We note that it was Erma's deliberate decision to ignore the service of process that led to the default judgment in favor of Poyner.

Since the district court had *in personam* jurisdiction over Erma, we reverse the judgment in this action and remand the case for further proceedings not inconsistent with this opinion. On remand the district court may consider the other grounds asserted for summary judgment. It also may entertain a motion to set aside the default judgment and dispose of the case on its merits.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-3105

JOE TERRY POYNER, - - - *Plaintiff-Appellant,*

v.

ERMA WERKE GMBH and
INSURANCE COMPANY OF NORTH
AMERICA, - - - - - *Defendants-Appellees.*

Before: LIVELY and KEITH, Circuit Judges, and
PHILLIPS, Senior Circuit Judge.

JUDGMENT—Filed March 28, 1980

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings.

It is further ordered that Plaintiff-Appellant recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.
John P. Hehman, Clerk
By (s) Grace Keller
Chief Deputy Clerk

A True Copy.
Attest:
(s) Dorothy J. Phelps
Deputy Clerk

Supreme Court, U. S.
FILED
JUL 21 1980
MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

No. 79-2031

INSURANCE COMPANY OF
NORTH AMERICA — PETITIONER

VS.

JOE TERRY POYNER and
ERMA WERKE GMBH — RESPONDENTS

POYNER'S BRIEF IN RESPONSE TO THE PETITION FOR CERTIORARI OF INSURANCE COMPANY OF NORTH AMERICA

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Attorneys for Respondent,
Joe Terry Poyner

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SUPREME COURT OF THE UNITED STATES

No. 79-2031

INSURANCE COMPANY OF
NORTH AMERICA PETITIONER

VS.

JOE TERRY POYNER and
ERMA WERKE GMBH RESPONDENTS

POYNER'S BRIEF IN RESPONSE TO THE PETITION FOR CERTIORARI OF INSURANCE COMPANY OF NORTH AMERICA

I. COUNTERSTATEMENT OF THE FACTS

Poyner's claim against Insurance Company of North America is a suit upon a judgment against INA's insured, Erma Werke GMBH. No one contests service of process or jurisdiction as to Insurance Company of North America (hereinafter referred to as INA). INA, as a matter of affirmative defense, is collaterally attacking a judgment obtained by Poyner

against a German manufacturer of cheap 22 caliber handguns. As such, INA bears the burden of proof in satisfying the Court it is entitled to prevail on its Motion for Summary Judgment. Thornberry v. Timmons, Ky., 406 S.W.2d 151 (1966); Ringo v. Commonwealth, Ky., 455 S.W.2d 49 (1970).

Erma Werke GMBH, the German handgun manufacturing concern, is a type of German corporate entity, wholly owned by an American parent corporation Lear Siegler, Inc. The facts of this relationship are more fully described in the reported decision of Poyner v. Lear Siegler, Inc., 542 F.2d 955 (6th Cir. 1976, pet. for cert. den.)

Joe Terry Poyner's cause of action against Erma Werke GmbH arose in 1968. Mr. Poyner, then 16 years of age, was

rendered a permanent paraplegic when one of Erma's 22 caliber handguns discharged its piece of lead into his spine.

L. A. Distributors, Inc., a New York importer, was, at that time the exclusive United States importer of Erma's weapons. This was a fact of which Erma was well aware, and trade which Erma was actively seeking to maximize. INA claims in its Petition that this exclusive distributorship arrangement did not occur until 1973. This is mistaken. The District Court, in thorough opinion outlined very carefully the contacts of Erma with L. A. Distributors and their contacts with Kentucky. This portion of his Opinion is found in the Petitioner's Appendix, pages A4-A9. As noted by District Judge Gordon, correspondence from the American attorneys representing Erma's interest in

the United States (see District Court Opinion, page A6), describes L. A. Distributors "as Erma's current exclusive United States importer . . ." (A8) This was in 1968, the year of plaintiff's accident; the year before suit was filed and process issued; and four years before the judgment against Erma was entered. Correspondence between officers of Erma Werke and Lou Imperato, the owner of L. A. Distributors, in February of 1968, disclosed that as early as November of 1967, there was discussion at Erma board meetings of L. A. Distributors purchasing Erma. This sale did not come to pass. This same correspondence directed the German manager of Erma "to come back to you (owner of L. A. Distributors) to resolve any agreement needed for a continuing distribution of Erma's sport

weapons in the United States." A second letter to Erma's German manager from one of Erma's American lawyers, also dated 1968 reflects:

> ". . . In response to the casualty company's inquiry, it was stated that Erma did not have assets or property in the United States, that Erma's only United States outlet was the independent New York based importer, Lou Imperato, (L. A. Distributor's owner) and that the sale of shipments of Erma products to the United States were completed outside of the United States; namely, paid for and delivered to Mr. Imperato in Hamburg, Germany. . . ." (Lear Siegler, Inc. v. Joe Terry Poyner, App., p. 116) (parenthetical remarks and emphasis ours)

In short, while the sales may have been "made" in Germany, they were made directly to Erma's "exclusive United States distributor -- L. A. Distributors (owned by Lou Imperato). As counsel for petitioner discusses, this arrangement was still in effect in 1973.

Erma Werke GMBH, at its corporate office in Dachau, West Germany received actual service of process pursuant to the technical requirements of KRS 454.210 on August 11, 1969. A proper return, signed by the recipient at Erma, was made and is in the Court file in this case. Thus, petitioner's repeated assertions of "attempted" service of process are inaccurate. There may be an issue whether that service of process was efficacious; the actual receipt by Erma of the notice, summons and complaint is not disputed.

L. A. Distributors, the New York importer who was the exclusive distributor for the United States of Erma's pistols, sold goods in Kentucky. LA Distributors sold to a distributor in Lexington, Kentucky. LA Distributors

directly solicited business in Kentucky through mail order catalogs, phone calls, and at national sporting goods conventions in Chicago. L. A. further advertised Erma's pistols in magazines of nationwide circulation. L. A. Distributors had a warehouse in North Carolina and an employed salesman in Tennessee, with which the State of Kentucky shares a common border for hundreds of miles.

It is asserted in the petition thatplaintiff's complaint against Erma did not assert a claim for breach of warranty. We disagree. So does the District Court. In Judge Gordon's words:

> "Plaintiff's complaint, filed some eight year ago, alleged both negligence and breach of warranty against Erma in the manufacture of a pistol. . . ." (Petition for Certiorari, A3) (emphasis ours)

II. IT DOES NOT VIOLATE DUE PROCESS TO HOLD A MANUFACTURER SUBJECT TO SUIT FOR ITS DEFECTIVE PRODUCTS IN A JURISDICTION WHERE IT, DIRECTLY OR INDIRECTLY, HAS SOUGHT TO MAXIMIZE THE SALE OF ITS PRODUCTS.

As stated in this Court's very recent pronouncement, World-Wide Volkswagen Corp. v. Woodson, ____ U.S. _____, 62 L.Ed.2d 490, 100 S.Ct. ____ (1980):

> ". . . Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Compare Gray v.

American Radiator & Standard Sanitary Corp., 22 Ill 2d 432, 176 NE2d 761 (1961)." Id at 501, 502 (emphasis ours)

While the Court, in World-Wide Volkswagen Corp., supra, so stated, its holding was with respect to a local retailer in New York and a three-State distributor of the product. As noted by footnote 3, 62 L.Ed.2d 496, neither the German-based manufacturer nor the United States importer even sought review of the Oklahoma Court's jurisdiction over them. In the present case, Poyner, we are dealing with the German manufacturing concern itself. The above-quoted stated from World-Wide Volkswagen Corp., supra, is in keeping with the weight of authority in the lower courts. See: Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir., 1969); Honeywell, Inc. v. Metz

Apparatewerke, 509 F.2d 1137, (7th Cir., 1975); Saccamani v. Robert Reiser & Company, Inc., 348 F.Supp. 514 (D.C.Pa., 1972); Coulter v. Sears, Roebuck and Co., 426 F.2d 1315 (5th Cir., 1970); Benn v. Linden Crane Co., 326 F.Supp. 995 (E.D.Pa., 1971); Scafati v. Bayerische Motoren Werke AG, 53 F.R.D. 256 (W.D.Pa., 1971).

While the petitioner, INA, adopts the reasoning of the District Court opinions in this case, it should be noted that the District Court felt jurisdiction would have been proper, except for a single, 1964 6th Circuit decision. The District Court stated:

> "By way of explanation of our partial summary judgment of September 7, 1977, may we state that we felt the trend showed that jurisdiction would have been proper except for the Velandra case; although Velandra probably should no longer stand, we

> as a District Court are not empowered to overrule it. Even plaintiff, in its present memorandum, admits that Velandra is an obstacle, albeit a 'dated milestone.' We are inviting the Sixth Circuit to really look closely at their approach to long arm statutes. It was, and is, a close question. . . ." (Petition for Certiorari, A21-A22 (emphasis ours)

III. JURISDICTION OVER ERMA IS PLAINLY CORRECT UNDER KENTUCKY LAW.

It would appear axiomatic that Kentucky statutes mean what Kentucky Appellate Courts say they mean.

In construing Kentucky's Long Arm Statute, KRS 454.210, the Kentucky Court of Appeals (then the intermediate appellate court) in Volvo of America Corp. v. Wells, Ky.App., 551 S.W.2d 826 (1977), was faced with upholding jurisdiction over a West Virginia retailer and two other foreign distributors on a breach of warranty claim on a Volvo

automobile. In upholding jurisdiction as to all three, the Court relied upon the analysis in Eyerly Aircraft Co, v. Killian, 414 F.2d 591 (5th Cir., 1969) and Keckler v. Brookwood Country Club, 248 F.Supp. 645, 649 (N.D.Ill., 1965). In Volvo of America Corp., supra, at 828 the Kentucky Court of Appeals quotes with approval from those two cases the following:

> "In the case of Eyerly Aircraft Company v. Killian, 414 F.2d 591 (1969) the Fifth Circuit upheld the Texas long arm statute in a suit where a child was injured at a carnival on a ride manufactured by Eyerly Aircraft Company in Oregon and sold in Chicago. The Company had no direct contact with the state of Texas. The Court held that considering the manufacturer had reason to know or expect that its product would be brought into the state of Texas that it was sufficient to support the Texas long arm jurisdiction over the manufacturer. In this Opinion it is stated that 'What is essential purposefully avails itself of the privilege of conducting activities within the forum state, thus

involving the benefits and protections of its laws.' The Court further stated that this result (upholding in personam jurisdiction) obtains where the manufacturer has elected to distribute his wares through independent wholesalers instead of through its own corporate apparatus so that it is only very indirectly responsible for the product reaching the injured consumer. The present trend is to take the next logical step and hold that a corporation is answerable where it introduces its product into the stream of interstate commerce if it had reason to know or expect that its product would be brought into the state where an injury occurred. Also it is stated 'where a defendant does business of such volume or with such a pattern of product distribution, that he should reasonably anticipate that his product may be ultimately used in any state, he has done the act required for the exercise of jurisdiction by the state where the injured user resides. Furthermore, the court citing Keckler v. Brookwood Country Club, 248 F.Supp. 645, 649 (N.D.Ill.1965) states:

"'When a manufacturer voluntarily chooses to sell his product in a way in which it will be resold from dealer to dealer, transferred from hand to hand and transported from state to state, he cannot reasonably claim that he is surprised at being

> held to answer in any state for the damage the product causes. Nor can he deny the substantial interest of the injured person's state in providing a convenient forum for its citizens.'
>
> "It was not unreasonable for the trial court to hold that the section of the statute above quoted applied to the defendants-appellants in this case. . . ." (emphasis ours)

Petitioner seeks to argue that Volvo of America Corp., supra, is bad Kentucky law. Whether the Federal Courts agree with it, or disagree with it as an interpretation of Kentucky law, is not a pertinent inquiry. The U. S. District Court, sitting in diversity, must follow it. Erie R. Co. v. Thompkins, 304 U.S. 64, 82 L.Ed. 1188. This applies to the analysis placed upon a statute by the highest state appellate court that has considered it. Fidelity Union Trust Co. v. Field, 311 U.S. 169, 178, 179; 85 L.Ed. 109, 113; 61 S.Ct. 176; reh'r. den.

311 U.S. 730

INA argues that the Sixth Circuit should have followed the Kentucky Intermediate Appellate Court decision in Tube Turns Division of Chemetron Corp. v. Patterson Company, Inc., Ky.App., 562 S.W.2d 99 (1978). It is worthy of note that Tube Turns Division, etc., supra, cites the Sixth Circuit decision, Davis H. Elliott Co., Inc. v. Caribbean Utilities Co., Ltd., et al, 513 F.2d 1176 (6th Cir., 1975) with approval, for the very point Poyner in the very present case advances -- KRS 454.210 was intended to extend to the limits of due process. Tube Turns Division, etc., supra, recognized this rule, but held under the facts of that case due process would not allow the exercise of jurisdiction over the defendant therein. Tube Turns

Division, etc., supra, is readily distinguishable from the present case on the very grounds stated by the Kentucky Court of Appeals:

> ". . . Unlike the nonresident seller who seeks to distribute its products within the forum state, the nonresident buyer enjoys no particular privilege or protection in purchasing products from a resident seller." (Ky. App., 562 S.W.2d 99)

The defendant in Tube Turns, supra, was a Colorado buyer. Here, on the other hand, Erma was a foreign manufacturer-seller who had actively sought to maximize its trade throughout this country and thereby necessarily including Kentucky. The "stream of commerce" line of decisions with respect to manufacturers amenability to long arm statutes, does not make distant purchasers subject to the jurisidiction of the manufacturer's residence. It works the

other way around. In Tube Turns, supra, the Colorado buyer had been solicited in Colorado by the Kentucky seller. This case simply has zero application to the present facts.

KRS 454.210 extends to the limits of due process. Davis H. Elliott Co., Inc. v. Caribbean Utilities Co., Ltd., supra; L'enfant, "Jurisdiction over Nonresidents, 64 Kentucky Law Journal 357, at 360; Ford Motor Credit Company v. Nantz, Ky., 516 S.W.2d 840, 842 (1974); Volvo of America Corp. v. Wells, supra.

IV. THE STATUTORY LAW OF GERMANY DOES NOT DICTATE THE POWER OR PROPER PROCESS OF AN AMERICAN FEDERAL COURT.

Federal Rule of Civil Procedure 4(i) "Alternate Provisions for Service in a Foreign Country" provides:

> "(i) Manner. When the Federal or State law referred to in subdivision (e) of this Rule authorizes service

> upon a party not an inhabitant of or found within the State in which the District Court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made:. . . (or) (d) By any form of mail, requiring a signed receipt, to be addressed and dispatched by the Clerk of the Court to the party to be served; . . ."

This is precisely what was done in the present case. Supreme Court Rule 19 in setting forth the considerations governing review on certiorari does not include certiorari as a method for seeking a change in the Federal Civil Rules. That is what INA appears to request.

As rather cogently stated by the Ninth Circuit in Duple Motor Bodies Ltd. v. Hollingsworth, 417 F.2d 231, 236 (9th Cir., 1969):

> "Nor do we share appellant's concern that we are here in an area of international, and not simply interstate, commerce. Problems of

> full faith and credit do indeed exist and enforcement in England of any judgment appellees may secure in Hawaii may well prove difficult if the views of English courts do not coincide with ours as to what is fair and just and in the best interests of foreign trade. This does not, however, relieve us of our obligation to deal with these problems in the light of the requirements of the Constitution of the United States as we view them." (emphasis ours)

CONCLUSION

The Sixth Circuit Court of Appeals' decision in the instant case is thorough, well-reasoned and needs no review. The District Court's opinion was obviously written with equal care. While the District Court's decision was adverse to respondents, that same Court literally invited the Sixth Circuit to hold for the respondents.

The eloquent appeal by petitioner, INA, for review based upon due process considerations has one fatal flaw. It

ignores this Court's language in a decision rendered six months ago. As succinctly stated by this Court in World-Wide Volkswagen v. Woodson, supra: ". . . The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." This is precisely what we have here. Petitioner seems to argue that some sort of respondeat superior, or master-servant relationship must be shown between the manufacturer and the distributor of its goods to uphold jurisdiction over the manufacturer. In the modern world of international commerce, this is unrealistic and unfair. As noted by this

Court if the manufacturer serves "directly or indirectly" the market where its defective product causes an injury, it is answerable there." As noted in McGee v. International Life Ins. Co., 355 U.S. 220, 2 L.Ed.2d 223, 226, 78 S.Ct. 199 (1957), also to be considered in determining the limits of due process is the hardship it would place upon the affected consumer from having to travel to the defendant's residence to litigate the claim. The result the petitioner seeks would force a severely injured Kentucky resident to pursue Erma only in the Courts of the Federal Republic of West Germany. With a corporation which has actively sought to maximize its trade in the United States, and what better market in the world could there be for cheap 22 caliber handguns, this is an

untenable conclusion.

For the foregoing reasons, it is respectfully requested that the Petition for Certiorari filed on behalf of Insurance Company of North America be denied.

Respectfully submitted,

WILLIAMS, HOUSMAN & SPARKS

By _____
1700 Kentucky Avenue
Paducah, Kentucky 42001

Attorneys for Respondent,
Joe Terry Poyner

CERTIFICATION

I hereby certify that three copies of this Response have been served upon all parties required to be served by Rule 33 of this Court by mailing the same, first class postage prepaid, as follows: Earle T. Shoup, Citizens Bank Building, P. O. Box 930, Paducah, Kentucky 42001, attorney for petitioner. Erma Werke, GMBH, 8060 Dachau, Johann-Ziegler-Str. 13/15, West Germany.

_____